

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 44454-2-II

JEFFERSON COUNTY CAUSE NO.s

09-1-000172-9, 09-1-00073-7

STATE OF WASHINGTON,

Appellant,

vs.

Timothy and Steven Fager,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

BRIEF OF APPELLANT

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When the State raised the question about whether Dr. Woodford's testimony met the *Frye* standard, the Trial Court was required to conduct a hearing to determine whether his theory is generally accepted in the scientific community.

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Dr. Woodford testified to his observations without establishing he employed scientific techniques or that his observations had been published in a peer-reviewed scientific journal. This is error and requires reversal.

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The Trial Court erred when it accepted Dr. Woodford's testimony without first resolving whether the evidence passes the *Frye* test before determining whether the evidence is admissible under ER 702.

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Other than Dr. Woodford's testimony that he had seen other closed grows with a filtration system, nothing established that he has any expertise in this area.

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The Trial Court's determination that the OPNET detectives acted in reckless disregard because they told the magistrate they smelled marijuana coming from the direction of 115 freeman on 23 separate occasions (8 by Apeland, 8 by Waterhouse, 3 by Grall, 4 by Fischer) is a totally incorrect application of the *Franks* test.

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There is no basis to suppress any of the other evidence the OPNET detectives observed when they served the thermal search warrant. The tape was suppressed because of mismanagement, not because the detectives exceeded the scope of the search warrant.

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I. Assignments of Error

Findings Relating to the Smell of Marijuana, page 9:

1. The Trial Court erred when it stated “this case boils down to the officers’ claim that they smelled marijuana.”

2. The Trial Court erred when it did not conduct a *Frye*¹ hearing prior to permitting Dr. Woodford to testify to his personal observations.

3. The Trial Court erred when it permitted Dr. Woodford to testify as an expert about an officer’s ability to detect the smell of marijuana without first determining whether Dr. Woodford’s first determining that his theory is generally accepted in the relevant scientific community and his techniques, experiments, or studies are capable of producing reliable results and are generally accepted in the scientific community.

4. The Trial Court erred when it entered finding 1: “[Dr. Woodford] has been testifying as an expert in marijuana and controlled substances since the 1990s. The State has acknowledged that Dr. Woodford is an expert on canine drug detection, but argues that Dr. Woodford is not an expert on human detection of marijuana. The Court finds Dr. Woodford to be a credible expert on the subject of odor marijuana, and find his opinions to be helpful to the issues at hand.”

5. The Trial Court erred when it entered finding 2: “[Marijuana] components all have different molecular mass weights, however, which cause them to disengage once they become airborne. As a result, the odors of growing marijuana cannot travel far, as the necessary 68 components sink to the ground at different rates. Dr. Woodford further explained that given the relatively heavy molecular weight of the marijuana aroma bouquet, the smell of marijuana cannot travel very far upwards” and “Because sulfur dioxide is comprised of just a sulfur atom and two oxygen atoms, it is not subject to dispersal like marijuana odor.”

6. The Trial Court erred when it entered finding number 4: “Given the

¹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), hereinafter *Frye*.

physical properties of the marijuana bouquet, growing marijuana is difficult to smell from distance. For instance, it may be possible for a human to smell growing marijuana that is 30 to 40 feet away. It might even be within the realm of possibilities, although extremely unlikely, for a human to catch a trace of marijuana at 50 to 60 feet. But any further, it is no longer humanly possible to detect the smell of growing marijuana.”

7. The Trial Court erred when it entered finding 5: “Dr. Woodford emphasized that the above distances assume ideal conditions. If, for example, there is a filtration system in effect, it may not be possible to smell growing marijuana at any distance outside of the building. This is consistent with Det. Grall’s statement in his affidavit that a filtration system makes it difficult or impossible to smell marijuana coming from an indoor marijuana grow operation. The Court heard persuasive testimony that there were two independently operating, sophisticated filtration systems in place at the time of the surveillance.”

8. The Trial Court erred when it entered finding 6: “The State did not present any expert testimony to contradict Dr. Woodford’s scientific testimony relating to the odor of marijuana.”

9. The Trial Court erred when it entered finding 10, based on distances listed in findings 8 and 9: “Dr. Woodford was presented with the various distances at which OPNET officers claimed to have smelled growing marijuana emanating from the shop at 115 Freeman Lane. Dr. Woodford was unequivocal that it would be impossible for the officers to smell the marijuana at those locations. The Court finds Dr. Woodford’s testimony on this issue credible. The Court finds that OPNET officers did not smell marijuana from the locations claimed in the affidavit for the search warrant.”

10. The Trial Court erred when it entered finding 11: “If this was simply one ‘nose hit’² of marijuana at an impossible distance, the Court might be more inclined to treat this a[s] a reasonable mistake, or that perhaps the officers were smelling marijuana growing from some other location. But given the number of ‘nose hits’ claimed at multiple locations, all of which are impossible

² “Nose hits” is a term used by the OPNET detectives to describe a whiff of the odor of marijuana. The term does not describe the strength of the fragrance, which can run from “faint” or “slight” to “very strong” or “powerful.”

distances from the shed, this Court has no option but to treat these statements as demonstrating a reckless disregard for the truth.”

11. The Trial Court erred when it entered finding 12: “The Court finds that all references to the smell of marijuana must be stricken from the affidavit in support of the thermal image warrant as well as the affidavit in support of the search warrant for 115 Freeman Lane.”

Finding / Conclusion relating to the Thermal Video, page 12

12. The Trial Court erred when it entered the final portion of finding 7: “The destruction constitutes mismanagement pursuant to CrR 8.3 (b) and all information obtained *from the search* and related to the court reviewing the search warrant application must be redacted and the evidence suppressed.”

Errors Related to the Conclusions of Law, page 14

13. The Trial Court erred in Conclusion 2 when it stated: “The State’s mismanagement of the thermal tape, which resulted in its destruction, does merit suppression of the thermal images *and suppression of evidence gained from that search warrant under CrR8.3 (b)*.”

14. The Trial Court erred in Conclusion 3 when it stated: “The Court concludes that based on OPNET’s reckless disregard for the truth, all statements relating to the smell of marijuana must be redacted from the affidavit in support of the thermal image warrant and the affidavit in support of the search warrant for 115 Freeman Lane.”

15. The Trial Court erred in Conclusion 4 when it stated: “When the statements relating to the smell of marijuana are redacted, there is no probable cause to support the thermal image warrant. All evidence derived from that warrant must be redacted from the search warrant for 115 Freeman Lane.”

16. The Trial Court erred in Conclusion 5 when it stated: “When evidence gained from the thermal warrant is redacted from the search warrant for 115 Freeman Lane, and when all assertions relating to the smell of marijuana are redacted as well, there is no probable cause to support that [sic] search warrant of 115 Freeman Lane.”

17. The Trial Court erred in suppressing “[a]ll evidence procured as a

result of the 115 Freeman Lane search warrant is suppressed.”

Issues Pertaining To Assignments Of Error

ISSUE ONE: Did the Trial Court err by failing to conduct a *Frye* hearing before permitting Dr. Woodford to testify to his observations? (Assignment of Error 2).

ISSUE TWO: Did the Trial Court err when it permitted Dr. Woodford to testify about his personal observations when the proponents of his testimony had not established that his theory was generally accepted in the scientific community and his techniques were incapable of accurate replication? (Assignments of Error 3, 5, 6, and 10)

ISSUE THREE: Did the Trial Court err when it permitted Dr. Woodford to testify as an expert under ER 702 (1) without first establishing that his observations passed the *Frye* test and (2) without determining whether his observations were based upon proven scientific theories? (Assignments of Error 4, 5 6 and 10)

ISSUE FOUR: Did the Trial Court err when it accepted testimony from Dr. Woodford about filtration systems solely because Dr. Woodford said he is familiar with the use of filtration in marijuana grow operations? (Assignment of Error 7)

ISSUE FIVE: Did the Trial Court committed reversible error by incorrectly applying the *Franks*³ test when it determined the OPNET detectives smelled marijuana but were reckless when they told the magistrate they smelled marijuana in excess of 30 to 60 feet away from its source? (Assignments of Error 1, 8, and 10)

ISSUE SIX: Did the Trial Court err when it struck the nose hits presented to the magistrate when OPNET detectives obtained a search warrant to enter the building at 115 Freeman Lane, without substantial evidence the nose hits did not occur within 30 to 60 feet and without a finding upon which to base suppression? (Assignments of Error 11 and 12)

ISSUE SEVEN: With an abundance of information to support the issuance of the thermal search warrant and the search warrant for utility records, and with the additional information obtained when the thermal search warrant was

³ *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), hereinafter *Franks*

served, has the Trial Court committed reversible error when it suppressed all the evidence obtained in the search of 115 Freeman Lane? (Assignments of Error 12, 13, 14, 15, 16, 17).

II. Statement Of The Case

On April 30, 2009, OPNET Detective Jim Vorhies sought the first order to conduct an intercept in this investigation.⁴ APPLICATION, 4/30/2009, exhibit 219, page 271. Detective Vorhies requested that a confidential informant (“CI”) be permitted to wear a “wire” to record conversations with Chaz Sullivan, a person the CI knew sold marijuana. *Id.* page 273, based on a marijuana purchase from Chaz Sullivan occurred in a parking lot on April 27, 2009. *Id.*, page 273. A second and third purchase was made from Chaz Sullivan and his girl friend, Jessica Bard, on May 5 and 7, 2009. *Id.*, page 213. On May 7, 2009, OPNET connected Chaz Sullivan to Bruce and Jenell Snyder because Chaz Sullivan needed to go to their home to get the marijuana. *Id.*, page 213. By mid-May of 2009, Chaz was talking about supplying larger quantities. *Id.*, page 214. Another purchase was made from Chaz Sullivan on May 13, 2009, with his mother supplying the marijuana. *Id.*, page 214.

By May 27, 2009, OPNET began to connect Al Sullivan to the sales.

⁴ The search warrants and supporting affidavits in Exhibit 219 total 280 pages. Because there was some disagreement about how many pages the warrants, affidavits and supporting information totaled, the State will both provide (1) the document title; (2) the date the document was signed; (3) exhibit 219; and (4) the page number. For example, the first document in the warrants and affidavits is AFFIDAVIT FOR SEARCH WARRANT, October 1, 2009, exhibit 210, page 1.

Id., page 216-17. Solid evidence had accumulated that Chad Sullivan was getting his marijuana from his mother, Jenell Snyder, who received the marijuana from Al Sullivan. APPLICATION FOR EXTENSION, exhibit 219, pages 232-239. OPNET told the magistrate that Chaz Sullivan was part of “the family” that included his mother, Jenell Snyder and was run by Albert Sullivan. “The family” sold marijuana. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, 7/3/2009, exhibit 219, page 210. OPNET informed the magistrate about Al Sullivan’s connections to the drug industry and to Kenneth Baker. APPLICATION FOR EXTENSION, July 29, 2009, exhibit 219, page 148-49. OPNET informed the magistrate the informant had seen Al Sullivan deliver marijuana to Kenneth Baker. *Id.*, page 149. Kenneth Baker told the informant that “no one is suppose [sic] to stop [at Jennell’s house] because Al is delivering marijuana to Jenell.” *Id.*, page 150. OPNET also explained the relationship between Al Sullivan, Bob Blank and Kenneth Baker. *Id.*, page 151. Kenneth Baker was paid with marijuana for working at Al Sullivan’s home. *Id.*, page 152. On June 3, 2009, Chaz Sullivan sold another quarter pound of marijuana to OPNET. *Id.*, page 157. The marijuana was supplied by Jennell Snyder. *Id.*, page 158.

By June 18, 2009, OPNET agents began to focus on Steven Fager as a person connected with Al Sullivan’s delivery of marijuana to the CI. AFFIDAVIT FOR SEARCH WARRANT (SUPPLEMENT), 9/11/2009,

exhibit 219, page 106. Agents traced a sale of marijuana to the CI when Al Sullivan obtained a paper bag from Steve Fager's garage that he took to Jennell Snyder's house after the CI requested a ¼ pound of marijuana. Jennell Snyder then supplied the marijuana to Chaz Sullivan. AFFIDAVIT FOR SEARCH WARRANT (SUPPLEMENT), September 11, 2009, exhibit 219, at pages 106-7. The same behavior occurred on June 18, 2009. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, September 22, 2009, exhibit 219, page 62.

On June 3, 2009, Chaz Sullivan sold another quarter pound of marijuana to OPNET. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, August 25, 2009, exhibit 219, page 157. The marijuana was supplied by Jennell Snyder. *Id.*, page 158. On August 10, 2009, OPNET bought another quarter pound of marijuana from Chaz Sullivan, furnished by Jenell Snyder. *Id.*, page 157. On August 11, 2009, OPNET purchased a quarter pound of marijuana, which was delivered directly from Al Sullivan's house CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, exhibit 219, 9/22/2009, at 64-65

OPNET detectives connected the Fagers with Al Sullivan's drug sales by September 1, 2009. AFFIDAVIT FOR SEARCH WARRANT (SUPPLEMENT), September 11, 2009, at 109. On September 22, 2009, Detective Grall Detective Grall began explaining to the magistrate the

connections between Al Sullivan and the Fagers. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, exhibit 219, 9/22/2009, at page 53. Attached to the AFFIDAVIT FOR SEARCH WARRANT, exhibit 219, 9/11/2009, was a “for sale” sign from Discovery Bay that listed Al Sullivan, Timothy Fager and Steven Fager as the joint property sellers. *Id.*, at 112-13, attachment “C.” He pointed out that Steve Fager, Al Sullivan and Timothy Fager are all owners of Aquaculture Systems. *Id.* at 55. He explained to the magistrate how Steven Fager’s purchase of supplies at a garden store had drawn the attention of federal drug agents in 2007. *Id.* at 55. The magistrate was told about Al Sullivan’s link to others who distributed drugs, *Id.* at 57-8, and then about his relationship with Steve Fager, dating back to 2007. *Id.* at 59. *Id.* at 56. Detective Grall then told the magistrate about all the times that Al Sullivan had been seen at Steve Fager’s house at 11 Glendale Drive. *Id.* at 54-9.

The remainder of the consolidated affidavit discusses other observations about Steven Fager. The only remarkable one was Steven Fager’s purchase of 608 gallon-size ziplock bags at Costco in late June. *Id.* at 67. OPNET told the magistrate that this size bag was recovered in each purchase that OPNET had made from Chaz Sullivan. *Id.*, at 67. Eventually, by accessing Jefferson County Assessor’s records, OPNET determined that Steven Fager, Timothy Fager, jointly own property in an area entitled “Discovery Bay

Village.” *Id.* pages 70-71. By placing detectives at numerous strategy points, they learned that the Fagers and Al Sullivan were travelling 115 Freeman Lane. *Id.*, at 72. Al Sullivan is the first person OPNET observed entering the property at 115 Freeman Lane. *Id.*, at 72. Detective Grall explained to the magistrate he wanted a thermal imaging search warrant and a utility records search warrant focused on 115 Freeman Lane because he believed that was where the marijuana was being grown. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, exhibit 219, 9/22/2009, at page 71.

On September 15, 2009, four OPNET detectives, Grall with Fischer, Apeland with Waterhouse, established a plan to watch the building at night from a neighboring property. *Id.*, at 74. Grall and Fischer took a position on or near the Fager property and observed nothing. While walking back out on Freeman Lane, however, they smelled “a very strong odor of marijuana” coming “directly in line with the location of the shop/garage at 115 Freeman Lane.” *Id.*, at 74. Before leaving the area, they eliminated two other residences at 9 and 11 Fulton Lane as the source of the strong smell. *Id.*, at 75. They recognized the same smell twice more, while walking in front of 9 and 11 Fulton Lane and determined the smell came from the direction of the shop/garage on Fager’s property. *Id.*, at 75. Exhibit “C” to CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, 9/22/2009, exhibit 219, page 88 (Attached as Appendix B).

At the same time, Detectives Apeland and Waterhouse were walking toward 115 Freeman Lane. *Id.* page 75. They smelled marijuana near 9 Fulton Lane and at 11 Fulton Lane, the same area that Detective Grall had smelled marijuana. *Id.* at 75. Both Detectives Apeland and Waterhouse determined the smell of marijuana was not coming from the two residences south of their position on Fulton Lane. *Id.* at 76.

On September 16, 2009, surveillance of the shop/garage continued, with Detectives Apeland and Fischer taking the early "shift." During the time they sat on property next to the Fager building's property line, they smelled the "unmistakable odor of fresh marijuana" emanating from the 115 Freeman Lane on five separate occasions. *Id.* page 76. Three "smells" were "very strong" and two were fainter. *Id.* page 76. They heard the humming sound associated with high energy lights and faintly heard the sound of a radio playing. *Id.* page 77. Detectives Grall and Fischer heard music emanating from 115 Freeman Lane on September 16, 2009 and later determined that the music sound was not emanating from the two residences on Fulton Drive. *Id.* at 77.

On September 21, 2009, OPNET agents Fischer and Waterhouse conducted surveillance at the Fager's property front gate. They saw Steven Fager drive onto his property and then smelled "the odor of marijuana that they described as strong, unmistakable and brief." *Id.* page 78.

The trial court issued three search warrants⁵ based upon the CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANTS. One warrant was to obtain utility consumption records. A second search warrant was to obtain the thermal image of the shop/garage at 115 Freeman Lane. SEARCH WARRANTS, 9/22/2009, exhibit 219, pages 44-52.

When the thermal image search warrant was served, Detective Grall indicated he and the other detectives “stood approximately 15 to 20 yards from the front of the target structure” at first, but then the detectives went around the building. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANTS, exhibit 219, October 1, 2009, pages 22-29. Detective Grall continued in the affidavit that he saw two vents, one larger and one smaller on the end of the building that is inconsistent with regular construction.. All the detectives could hear the fans running in the building and the radio. Detective Grall then explained:

“As Affiant’s and detectives stood along the south side of the building, Detectives Jeff Waterhouse, Mark Apeland, Trooper Eric Tilton, Agent Keith Fischer and Affiant Grall, clearly detected a breeze coming from the west, or from the back of the shop where the large vent is located. These same detectives smelled a strong odor of fresh marijuana that was unmistakable and constant while standing along the south side of the shop. It was obvious to these officers and detectives that the odor of fresh marijuana was coming from the shop.”

⁵ The third search warrant, to obtain Steven Fager’s purchase records at Costco, was not served because Timothy Fager’s wife worked there in an administrative position. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, October 1, 2012, exhibit 219, page 22.

Id., at 29-30.

Detective Grall also discussed the utility records. He had spoken to Brad Teel, an electrical engineer with the Clallam County Public Utility District. *Id.* at 32. In a nutshell, Detective Grall learned the utility usage at 115 Freeman Lane was exactly opposite what a water pumping station should show. A graph of electrical usage would be an inverted “U” in the summer⁶. *Id.*, at 32. The utility records at 115 Freeman Lane showed a normal “U” in the summer months, meaning that the power usage at 115 Freeman matched normal residential power usage rather than power usage consistent with a water pumping station: Higher in the winter and lower in the summer. *Id.*, at 33.

Based the smells of marijuana coming from the building, the results of the thermal imaging tape, and the utility consumption records showing abnormal power usage, the trial court issued search warrants on October 1, 2009 to search the building and grounds at 115 Freeman; to arrest Albert Sullivan and search his residence, including outbuildings and vehicles; to arrest Jenell Snyder and search her residence and vehicle; to arrest Chaz Sullivan and arrest his apartment and vehicle; to arrest Timothy Jay Fager and search his residence, including outbuildings and his green Dodge truck; to arrest Steven Fager and search his residence and curtilage in Sequim, and his white Jetta. SEARCH WARRANTS and AFFIDAVITS FOR SEARCH

⁶ A bell curve

WARRANTS, October 1, 2009, pages 1-21.

Albert Sullivan, Jenell Snyder, Chaz Sullivan and others were charged with various felony and misdemeanor drug possession and possession with intent to deliver charges in Clallam County and are not a part of this appeal. Steven and Timothy Fager were charged in Jefferson County with felony possession of marijuana and possession with intent to deliver in Jefferson County 09-1-00172-9 and 09-1-00173-7 (CP 1). A “motion to suppress or for a Franks hearing” was filed by Steven Fager on 11/14/2011 and joined by Timothy Fager on 12/16/2011 (09-1-00173-7 CP 39, volumes II through XII; 09-1-00172-9 CP 65). The State filed a response to the motion to suppress on 1/20/2012 (09-1-00173-7 CP 50).

Prior to the suppression hearing, James Woodford submitted a declaration in which he stated he could state with scientific certainty that the officers could not smell marijuana 300 yards from the source (CP 64). Woodford explained he has testified “numerous” times as an expert witness related to the requirements and conditions for humans to reliably smell-detect drug odors, including Washington state (CP 63). His scientific proof for his evaluation was his research regarding smell identifications (Olfactory methods) for controlled substances (CP 63). His curriculum vitae (CP 70-74) does not include any peer-reviewed article addressing his theory. Because of Woodford’s lack of scientific data, his lack of scientific methods, and his lack

of publication for peer review of his theories, the State moved the Court to preclude Woodford from testifying as an expert (CP 86, 87; 5/2/2013; 8/15/2012 RP I-42). Court overruled the State's objections to Dr. Woodford's testimony (5/2/2013; 8/15/2012 RP I-44).

On August 15, 2012,⁷ Detective Grall testified that he had been with the State Patrol for 24 years and with OPNET 13 years (5/2/2013; 8/15/2012 RP I-2-3). Detective Grall testified that the locations in Exhibit 15⁸, admitted, where he and Detective Fischer had smelled marijuana was accurate (9/6/2013; 8/15/2012, RP 1-112) and were the same as he supplied to the magistrate on September 22, 2009 (CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, 9/22/2009, exhibit 219, page 88 ("C")).

Detective Grall was examined about his prior experience in detecting marijuana grows by smell. He testified that filtration combined with construction in one case and in an underground grow had made it impossible to smell marijuana from the outside (9/6/2013; 8/28/2012 RP III- 144-5). He also pointed out that an inability to get in a right position with the atmospheric conditions had not worked out in some cases (9/6/2013; 8/28/2012 RP III- 146). Detective Grall testified that "filters are awesome..[b]ut there are other factors besides just filtering (9/6/2013; 8/27/3012; RP II-187):

⁷ The VRP was ordered in two portions; the first part was filed May 2, 2013; the second part was filed September 6, 2013. The report of proceedings notations in this brief are (1) date VRP was filed; (2) date of hearing; (3) volume; and (4) page.

⁸ Exhibit 15 is the same as Exhibit 98, attached as Appendix B.

“I mean there’s a huge amount of variables. A lot of it has to do with where the plants are located or the marijuana is located, what the condition of the marijuana is, mature, vegetative or starter plants, processed marijuana. Where it’s located, the concentration, the amount, the type of structure or area, atmospheric conditions, ventilation systems. There’s a whole host of issues that are brought up.”

Following his testimony about factors that might influence whether he could mask the odor of marijuana, Detective Grall testified to his level of expertise:

“I believe [I have observed] slightly over 60 grows, but that includes outdoor and indoor, so indoor my best guess would probably be somewhere 30 or more, at least.”

(9/6/2013; 8/27/3012; RP II-187). In every case, filter or not, he found marijuana in every case in which he smelled it before seeing it (9/6/2013; 8/27/3012; RP II-191). Detective Grall’s testified that the first nose hit was 100-110 yards from the source (9/6/2013; 8/15/2012 RP I-115).

Detective Apeland explained his training and expertise in marijuana odor detection (5/2/2013; 8/20/2012 RP II-170). He testified he had 30 hours of training at DEA training in Seattle, and at the basic law enforcement academy, plus viewing both indoor and outdoor marijuana grows (8/20/2012 RP II-170). He felt comfortable assessing growing marijuana when he smelled it (5/2/2013; 8/20/2012 RP II-170). As an experienced detective, he had “seen it often, since the very beginning of my career.” (5/2/2013; 8/20/2012 RP II-170). He had been to numerous outdoor grows, indoor grows, had seen both green and processed marijuana in vehicles, on people’s person, and in

residences (5/2/2013; 8/20/2012 RP II-171). He had smelled marijuana at an outside grow at a significant distance away from his location (5/2/2013; 8/20/2012 RP II-171). On quite a few occasions, he had written search warrants for marijuana grows based on his ability to detect marijuana (5/2/2013; 8/20/2012 RP II-172). In every case, he had found marijuana where he said it would be after first smelling it at a distance (5/2/2013; 8/20/2012 RP II-172).

Detective Apeland testified that he and Detectives Grall, Waterhouse, and Fischer returned to 115 Freeman Lane on September 15, 2009 and broke into two teams – Detective Apeland and Detective Waterhouse were one team; Detective Grall and Detective Fischer were the other team (5/2/2013; 8/20/2012 RP II-161). When it was his turn to conduct surveillance, Detective Apeland could smell the distinct odor of marijuana at the corner of Manzanita and Holland⁹ (5/2/2013; 8/20/2012 RP II-162). It was pretty strong and very distinct, lasting about three minutes (5/2/2013; 8/20/2012 RP II-163). He and Detective Waterhouse could still smell the odor coming at them after they walked past the last house on Fulton Drive (5/2/2013; 8/20/2012 RP II-163). Exhibits 68 A showed Detective Apeland's location where he first smelled the marijuana. Exhibit 68 B shows where Detectives Apeland and Waterhouse were walking up Fulton toward 115 Freeman with the wind in their face

⁹ Detective Apeland meant "Honeymoon Lane." "Holland Drive" is the street that meets Highway 101 and is a considerable distance from Manzanita Drive.

(5/2/2013; 8/20/2012 RP II-165-6). He and Detective proceeded down to the lower observation point next to the Fager property but did not smell marijuana again that night (5/2/2013; 8/20/2012 RP II-166).

Detective Apeland and Detective Waterhouse returned to the observation point the following night (5/2/2013; 8/20/2012 RP II-168). He smelled the odor of marijuana coming directly from the shop (5/2/2013; 8/20/2012 RP II-167). It was an unmistakable smell of green marijuana (5/2/2013; 8/20/2012 RP II-169). He had several nose hits of marijuana that night, three real strong distinct hits and a couple of fainter hits, "all pretty much continuous from the shop" (5/2/2013; 8/20/2012 RP II-169). He was 100 percent sure he smelled marijuana coming from 115 Freeman on five occasions (5/2/2013; 8/20/2012 RP II-172).

Detective Fischer testified next on behalf of the State (5/2/2013; 8/22/2012 RP III-2). On September 15, 2009, he and Detective Grall smelled a very strong scent of green marijuana (5/2/2013; 8/22/2012 RP III-16). They had just passed the driveway of the last house on Fulton Way and "it hit me very strongly" (5/2/2013; 8/22/2012 RP III-16). He turned and observed Detective Grall "with his eyes closed and his nose up in the air" so he knew Detective Grall also smelled it (5/2/2013; 8/22/2012 RP III-17). The wind was coming "up the street from the direction of the grow" (5/2/2013; 8/22/2012 RP III-17). Detective Fischer testified he also had a second faint nose hit at the

corner of Honeymoon Lane and Fulton Way (5/2/2013; 8/22/2012 RP III-18), exhibit 83, admitted). The smell was coming from the northwest (5/2/2013; 8/22/2012 RP III-19). Detective Fischer testified to a third nose hit on the same evening, as he and Detective Grall were walking on Honeymoon Lane just approaching Manzanita (5/2/2013; 8/22/2012 RP III-26; exhibit 85 admitted). The smell was strong but brief, coming from the direction of the shop (5/2/2013; 8/22/2012 RP III-26). He also testified he smelled marijuana when Steve Fager drove up to the building on September 21, 2009 (5/2/2013; 8/22/2012 RP III-21). He and Detectives Waterhouse were sitting in the woods observing the Fager gate when Steve Fager drove up (5/2/2013; 8/22/2012 RP III-24). Approximately 30 minutes after Mr. Fager drove onto the property, he smelled a "faint nose hit" that was "coming from the direction of the shop" (5/2/2013; 8/22/2012 RP III-25).

Detective Fischer testified that his formal training in the detection of marijuana was from a DEA course in 2009 (5/2/2013; 8/22/2012 RP III-38). As a border patrol agent, he had experienced the smell of fresh cut and growing marijuana, many times he smelled it prior to making any visual observations; in each case, he located the marijuana ("every time") (5/2/2013; 8/22/2012 RP III-39). He had found growing marijuana five to ten times, at a range of 10 feet to 75 yards from the source of the smell (5/2/2013; 8/21/2012 RP III-40).

Detective Waterhouse testified he smelled marijuana five times on

September 16, 2009, when the wind was coming toward him (5/2/2013; 8/22/2012 RP III-88-9). Detective Waterhouse also testified about smelling marijuana as he walked toward 115 Freeman (5/2/2013; 8/22/2012 RP III-91; exhibit 137 admitted). He testified it was coming from up the roadway (5/2/2013; 8/22/2012 RP III-91) and the breeze was gentle (9/6/2013; 8/27/2012 RP II 60). He also testified that he and Detective Fischer very briefly smelled marijuana on September 21, 2009 when Steve Fager was at 115 Freeman (5/2/2013; 8/21/2012 RP III-94).

To contradict the Defendant's testimony, the Fagers presented the testimony of Dr. Woodford over the State's objection (5/2/2013; 8/20/2012 RP II-42). The State challenged Woodford's expertise in the area on *voir dire*:

"But I have found nothing in anything that you've written or that anybody else has written that indicates that you have the qualifications on telling how far marijuana will go in the air under open conditions." (5/2/2013; 8/20/2012 RP II-49).

Woodford responded that he had developed his own research (5/2/2013; 8/20/2012 RP II-50). He testified that a federal court had ordered him learn how far the odor would extend (5/2/2013; 8/20/2012 RP II-49). He and the drug agents had circled the building all night and none of them had smelled marijuana more than 50 feet from the building (5/2/2013; 8/20/2012 RP II-50). He repeated the experience on other seized grows and "it became very clear to me from doing these kinds of experiments that there was something very interesting going on,.." (5/2/2013; 8/20/2012 RP II-50). The odor "all of a

sudden” disappeared. He found this fascinating (5/2/2013; 8/20/2012 RP II-50). He indicated that he had had the same experience at another grow, so he then determined that the smell of marijuana could not travel any distance at all (5/2/2013; 8/20/2012 RP II-51-2). Woodford then explained how he determined that the chemical properties of marijuana could not be smelled at a long distance. (5/2/2013; 8/20/2012 RP II-53-5). He was permitted to testify that the fresh marijuana could not be smelled after 30 or 40 feet because the chemicals would deteriorate (5/2/2013; 8/20/2012 RP II-57-8).

The Trial Court issued its oral opinion on December 19, 2012 (5/2/13; 12/19/2012 RP V-2). The Court suppressed the thermal imaging tape based on government negligence or mismanagement that had led to the tape’s erasure while in evidence (5/2/2013; 12/19/2012 RP V-14). The Court then addressed the nose hits, questioning whether the OPNET detectives could smell marijuana from the distances they indicated on the streets leading to 115 Freeman (5/2/13; 12/19/2012 RP V-14). The Court focused on exhibit 98, admitted, the document showing the location of twenty plus separate nose hits by OPNET detectives and determined that he could not ignore Dr. Woodford’s testimony that it was impossible to smell marijuana at a distance greater than twenty yards (5/2/13; 12/19/2012 RP V-16). “And so I look at that and go, okay, can you smell marijuana? Do you know it’s coming from 115 Freedom [sic] Lane? I mean, you say it is. But how do you know it’s coming from there

and not some other place, if you do indeed smell marijuana?...I don't know what they were smelling. Maybe there's other marijuana in the neighborhood, but they certainly couldn't smell it from 115 Freeman Lane." Court's Oral Opinion (5/2/2013; 12/19/2012 RP 15-17). The Court suppressed the 23 nose hits the detectives supplied the magistrate to obtain the thermal search warrant (5/2/2013; 12/19/2012 RP -17).

On January 9, 2013, the State entered its objections to the findings of fact and conclusions of law (5/2/13; 1/9/2013 RP V-18). The State again expressed that Dr. Woodford's testimony was nothing more than personal opinion, with no scientific support (5/2/13; 1/9/2013 RP V-46). The State pointed out "I don't remember the Court ever saying this indicated a reckless disregard for the truth" (5/2/13; 1/9/2013 RP V-46). The Court clarified that the finding 11, reckless disregard, meant the detectives were "reckless in associating [the smell of marijuana] with 115 Freeman Lane" (5/2/13; 1/9/2013 RP V-47). With the evidence suppressed, the case was dismissed (5/2/13; 1/9/2013 RP V-50).

III. Argument

ISSUE ONE: Did the Trial Court err by failing to conduct a *Frye*¹⁰ hearing before permitting Dr. Woodford to testify to his observations? (Assignment of Error 2).

RESPONSE: When the State raised the question about whether Dr. Woodford's testimony met the *Frye* standard, the Trial Court was required to

¹⁰ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), hereinafter *Frye*.

conduct a hearing to determine whether his theory is generally accepted in the scientific community.

I. Standard of Review: Questions of admissibility under *Frye* are reviewed *de novo*. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593,600,260 P.3d 867 (2011).

II. Analysis: Dr. Woodford told the Court he was going to testify to a scientific principle in his declaration (CP 62-69). The State challenged his theory, his scientific proof, and his credibility (5/2/2013; 8/15/2012 RP I-42-44). At that point, the Trial Court erred when it refused to require the Fagers to present proof that Dr. Woodford's testimony was peer-reviewed and generally accepted in the scientific community. The Trial Court's refusal to require proof that supports Dr. Woodford's testimony is reversible error.

A *Frye* hearing is necessary when the testimony involves a novel scientific theory. *State v. Phillips*. 123 Wn.App. 761, 98 P.3d 838 (2004). To determine whether the evidence is novel, the courts "must look to see whether the theory has achieved general acceptance in the appropriate scientific community." *State v. Riker*, 122 Wn.2d 351, 359-60 869 P.2d 43 (1994). To determine if novel scientific evidence satisfies *Frye*, the Court must perform "a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority." *State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996). The proponent must present "expert testimony, scientific writing that had been subject to peer

review and publication, secondary legal sources, and legal authority from other jurisdictions." *Lake Chelan Shores Homeowners Assoc. v. St. Paul Fire & Marine Ins. Co.*, No. 66636-3-1, slip op., at 3 (Wn.App. August 19, 2013). The trial court must find that the scientific evidence has been generally accepted in the scientific community before admitting the testimony. *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006).

The State asked Dr. Woodford on *voir dire* about any publications he or any other scientist had produced:

"I have found nothing in, anything that you've written or that anybody else has written that indicates that you have the qualifications on telling how far marijuana will go in the air under open conditions." (5/2/2013; 8/20/2012 RP II-49).

Dr. Woodford did not point to any studies that he or anyone else had completed and published; instead he stated his qualifications were his observations. (5/2/2013; 8/20/2012 RP II-50-2). Failing to require Dr. Woodford to first prove his theory had achieved general acceptance in the scientific community was error. Failure to conduct a Frye test or to admit erroneous evidence is reversible error because the error is not harmless. *State v. Sipin*, 130 Wn.App. 403, 421, 123 P.3d 862 (2005).

ISSUE TWO: Did the Trial Court err when it permitted Dr. Woodford to testify about his personal observations when the proponents of his testimony had not established that his theory was generally accepted in the scientific community and his techniques were incapable of accurate replication? (Assignments of Error 3, 5 and 6)

RESPONSE: Dr. Woodford testified to his observations without establishing

he employed scientific techniques or that his observations had been published in a peer-reviewed scientific journal. This is error and requires reversal.

I. Standard of Review: Questions of admissibility under *Frye* are reviewed *de novo*. *Anderson v. Akzo Nobel Coatings, Inc., supra*.

II. Analysis: There are two parts to the *Frye* test: First, the scientific theory or principle upon which the evidence is based must have gained general acceptance in the relevant scientific community. Second, the trial court must find that the "techniques, experiments, or studies utilizing that theory" are generally accepted in the relevant scientific community and capable of producing reliable results. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013), quoting *Anderson*, 172 Wn.2d at 603, 260 P.3d 867.

The proponent of scientific evidence must show that the scientific principle has gained general acceptance in the relevant scientific community. *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984); *Lakey* 176 Wn.2d at 918, 296 P.3d 860, quoting *Anderson*, 172 Wn.2d at 603, 260 P.3d 867.

The proponent must also prove their "techniques, experiments, or results and are generally accepted in the scientific community." *Riker*, 122 Wn.2d at 359, 869 P.2d 43; *Lakey*, 176 Wn.2d at 918, 296 P.3d 860, quoting *Anderson*, 172 Wn.2d at 603, 260 P.3d 867. The proponent of a theory carries the burden to prove that a theory is generally accepted in the scientific community. Otherwise, the information is not admissible. *In re Marriage of Parker*, 91 Wn.App. 219, 226, 957 P.2d 256 (1998).

Rather than conduct scientific experiments with scientific techniques and publish them in a peer-reviewed scientific journal, Dr. Woodford simply noted his observations (5/2/2013; 8/20/2012 RP II-50-55). The State does not disagree that Dr. Woodford knows the chemical makeup of marijuana; he is a chemist. But, when he stated he was surprised to learn the smell of marijuana would only travel a short distance, he proved he did not understand how air movement, the human senses, the time of day, and foliage would limit the distance the fragrance would travel. He developed his own theory when a federal court had ordered him to learn how far the odor would extend (5/2/2013; 8/20/2012 RP II-49).

Dr. Woodford did not point to any scientific studies, peer reviewed or otherwise, that he or any other scientist had conducted to determine how far the odor of marijuana carried in the open air. A review of Dr. Woodford's curriculum vitae (CP 71-74) shows he has published nothing related to his theory that the smell of fresh marijuana can only travel 30 to 60 feet in the air. His list of "authored works" contain no reference to any peer-reviewed (or non peer-reviewed) articles about his theory. Dr. Woodford never presented anything to show his theory and practices had gained general acceptance in the scientific community (5/2/2013; 8/20/2012 II-49-169).

The Fagers made no attempt to present anything at all to show that Dr. Woodford's "theory or principle has achieved general acceptance in the

relevant scientific community." Instead, they leaped over the question about whether Dr. Woodford's testimony reflected the general consensus of the relevant scientific community and urged his testimony under ER 702. The Court accepted the testimony over the State's objection that the testimony did not reflect general acceptance in the relevant scientific community.

State v. Cauthron, 120 Wn.2d at 888, 846 P.2d 502, succinctly explained the proponent's burden and the trial court's responsibility when the evidence is challenged:

The reviewing court undertakes a more searching review- one that is sometimes not confined to the record. Because it is impractical to parade a true cross-section of scientists before the court, the scientific literature may be considered on the ultimate issue of consensus....Law articles, too, may be considered for that purpose. (one citation omitted).

Dr. Woodford's procedures for creating his theory are as unscientific as can be imagined. Dr. Woodford testified that he conducted his own experiments in which he would place an unspecified quantity of marijuana in a central place and had different people stand at different locations at different times see how far away they could walk before they could not smell the marijuana (5/2/2013; 8/20/2012 RP II49-52). There were no standards and techniques established and none of what he observed was written down and published for peer review. His testing is precisely the opposite of a scientific test. It is impossible to obtain any scientific consensus when he established no quantifiable variables in his testing. Who were the people in the test? What is

their experience in detecting marijuana; is it anywhere near Detective Grall's 60 times? Are they male or female? What time of day is it? What are the weather conditions and other atmospheric conditions? Was there a breeze; if so, how strong was it and from which direction? How much marijuana was placed? What was the maturity level of the marijuana? All these factors and others affect the result. What Dr. Woodford testified to was nothing more than "unreliable, untested, ... junk science." *Anderson*, 172 Wn.2d at 863, 260 P.3d 857, citing to 5B *TEGLAND*, §702.18 at 81. The Court erred when it received his testimony.

ISSUE THREE: Did the Trial Court err when it permitted Dr. Woodford to testify as an expert under ER 702 (1) without first establishing that his observations passed the *Frye* test and (2) also without determining whether his observations were based upon proven scientific theories? (Assignments of Error 4, 5 and 6)

RESPONSE: The Trial Court erred when it accepted Dr. Woodford's testimony without first resolving whether the evidence passes the *Frye* test before determining whether the evidence is admissible under ER 702.

1. Standard of Review: A trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. *State v. McCarthy*, No. 42803-2-II, slip op. at 16, (Wn.App. November 19, 2013); *Lakey*, 176 Wn.2d at 919, 296 P.3d 860. A trial court abuses its discretion when it relies on unsupported facts, applies the wrong legal standard, or when it adopts a view that no reasonable person would take. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

II. Analysis: The *Frye* standard must be met before the evidence becomes admissible under ER 702. *Lake Chelan*, , page 2.; *In re the Detention of Ritter v. State*, No. 30845-6-III, slip op., p. 2, (Wn.App. November 5, 2012). The Trial Court erred in qualifying Dr. Woodford as an expert until the *Frye* issue was resolved. This error, alone, mandates reversal because the Trial Court applied the wrong legal standard.

Secondly, the Trial Court abused its discretion to admit Dr. Woodford's testimony under 702. When the State objected to Dr. Woodford's testimony with no foundation for his testimony, the Fagers were required to establish his ability to testify about the movement of marijuana in the open air. 5 TEGLAND § 702.5.¹¹ Nothing in the Fager's questions ever remotely established more than Dr. Woodford's observations. None of his testimony arose to a scientific certainty.

ER 702 permits a witness with "scientific, technical, or other specialized knowledge" to testify if it will assist the trier of fact to understand the evidence or to determine a fact in issue." *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004); ER 702. However, the witness may not testify about an issue that lies outside the witness's area of expertise. *State v. Weaville*, 162 Wn.App. 801, 824, 256 P.3d 426 (2011), *cert. denied*, 173 Wn.2d 1004 (2011).

Testifying about olfactory senses and the effect of air currents on the

¹¹ The State had a standing objection to Dr. Woodford's testimony because it had moved in limine. *Millican v. N.A. Dagerstrom, Inc.*, No. 30185-1-III, slip op. 1 (Wn.App. November 15, 2013).

odor of marijuana are outside Dr. Woodford's scientific expertise. He has no education in the olfactory senses of human beings (5/2/2013; 8/20/2012 RP II 38-40). He also claims to be an expert on air movement, changes in altitude, and how foliage and other interfering objects affect a person's ability to smell marijuana, without any formal education or scientific experience in the area (5/2/2013; 8/20/2012 RP II 75-6).

Bruns v. Paccar, Inc., 77 Wn.App. 201, 215-16, 890 P.2d 469 (1995), presents an example showing when a witness' testimony passes the *Frye* test and becomes expert testimony under ER 702. *Bruns*, 77 Wn.App. at 215, 890 P.2d 469. The plaintiffs contended the testimony of the defendant's experts did not comply with ER 703, claiming their testimony exceeded facts and data reasonably relied on by expert witnesses in the field. *Bruns*, 77 Wn.App. at 215, 890 P.2d 469. The court disagreed, stating the experts relied on air sampling, chemical analysis, clinical examination, and questionnaires. These qualify as established scientific methods of the type relied upon by experts in the field..." *Bruns*, 77 Wn.App. at 216, 890 P.2d 469.

Unlike the experts in *Bruns*, Dr. Woodford's testimony was not based upon facts reasonably relied on by experts in the field of chemistry. His testimony was based upon his observations. In *Bruns*, the experts utilized different accepted scientific methods as guides to establish each opinion. Dr. Woodford only relied on one scientific principle (the chemical makeup of

marijuana) and no other scientific concepts, including human senses, air movement, maturity of plants, foliage, or any other information that exceeded what he observed.

Tegland warns about the sort of error the Trial Court made:

“The ‘reasonably relied upon’ language in Rule 703 should not be confused with the *Frye* rule, which requires general acceptance in the scientific community. The *Frye* rule relates to the scientific principles and techniques employed by the expert in reaching an opinion. By contrast, Rule 703 relates to the factual information relied upon by the expert; i.e., to the factual basis for the opinion. The distinction, however, is easily blurred and the courts sometimes treat the two as essentially the same rule, or as two rules that yield the same result.”

5B TEGLAND § 703.3. In *Bruns*, the experts employed accepted scientific methods to arrive at their opinions. Dr. Woodford relied on observations and nothing more. In his declaration (CP 62-74) he provided an experiment in which he placed a fan behind a marijuana plant (CP 66) and believed that his experiment proved his theory. The experiment proved nothing about how marijuana odors travelled in the open air. Forcing marijuana through a 30 foot tube only proves that marijuana breaks down when pushed through a 30 foot tube (CP 67; 5/2/2013; 8/20/2012 RP II-55).

Dr. Woodford's credentials, as established in court and in decisions he provided to the Court, only include laboratory work. He freely admitted he did not have a degree in forensic chemistry (5/2/2013; 8/20/2012 RP II-40) but qualified his answer by explaining his laboratory training and experience

(5/2/2013; 8/20/2012 RP II-40-42). His list of credentials in his curriculum vitae (CP 71-74) and in court did not include anything related to how to conduct forensic field work. He simply was not qualified to testify to his theory, that the odor of marijuana may only be smelled at a distance of 30 to 60 feet. It was error to admit his testimony under ER 702.

Attached to Timothy Fager's response to the State's motion to exclude any testimony of Dr. Woodford's proffered testimony are a number of uncited, unpublished examples, presumably from Dr. Woodford, in which he attempted to show his expertise in all things related to marijuana and cocaine. Only the first case relates to his theory about the smell of marijuana in the open air.

In *United States v. Roland Arsons*, No. 1:-5-cr-243 AWI (E.D. Cal. 2007), Dr. Woodford testified that "seedlings do not yet produce and emit the sweet, generous characteristic distinctive odor of marijuana." Opinion, page 19. However, the Court did not base its opinion on Dr. Woodford's testimony. Rather, the Court found the declarant "had sufficient background, training, and experience to be able to detect the odor of marijuana" Op., page 19. The Court also found persuasive the testimony of "four individuals that...I can't say that they were incorrect or that they were inaccurate." Op. page 23. Ultimately, the Court focused on what the witnesses smelled rather than the opinion of Dr. Woodford.

Because Dr. Woodford has a history of citing to unpublished cases and

opinions to show he is a credible expert, the State is presenting other uncited and cited opinions to establish trial courts have not always find him credible.¹²

In *State v. Edmark*, No. 51424-5-1 (Wn.App. Jan. 24, 2003), Dr. Woodford admitted that a person could smell growing marijuana from 300 yards away from its source. *Edmark*, at 5. The detective's testimony related to wind currents and how he was able to follow the smell away from where he first detected it 300 yards away. *Edmark*, at 5. In the present hearing, Dr. Woodford explained the appellate court's alleged misrepresentation of his testimony in the *Edmark* opinion during this suppression hearing (5/2/2013; 8/20/2012 RP II-62). According to Dr. Woodford, he was merely joking when he answered the prosecutor's question and the appellate court took his joke out of context (5/2/2013; 8/20/2012 RP II-62).

In *State v. Remboldt*, 64 Wn.App. 505, 827 P.2d 282 (1992), Deputy Van Leuven testified he smelled the moderate odor of marijuana coming from the Remboldt residence *Id.* at 507-8. He knew the odor was marijuana because he had obtained 70 to 75 search warrants based upon his expertise, and he had found marijuana each time *Id.* at 507. Dr. Woodford testified that Van Leuven could not have smelled it; the smell of marijuana replicates the smell of other plants and the plants seized were too immature to create enough odor for

¹² Since the publication of *State v. Evans*, 177 Wn.2d 186, 196, n.1, 298 P.3d 724 (2013), the State understands that GR 14.1 permits use of uncited opinions for purposes other than as authority. The cases are cited only to challenge the credibility of Dr. Woodford. It would be unfair to permit Dr. Woodford to cite to numerous uncited opinions to establish he is a credible scientist without being permitted a response.

detection *Id.* at 508. The Court of Appeals reversed the trial court's suppression of the evidence because the trial court had accepted Dr. Woodford's testimony about "selective perception." *Id.* at 508. The Court of Appeals held the trial court had not given the magistrate's determination sufficient deference and had not reviewed the matter for an abuse of discretion. Instead, it had applied a hyper technical analysis, when the record created by the State clearly showed the officer had the expertise to make the determination he made. *Id.* at 510, 827 P.2d 282.

In *State v. Easton*, No. 28998-9-J1 (Wn.App. October 12, 2004), the trial court refused to give any weight to Dr. Woodford's testimony because he "never had direct contact with the plants and his analysis was dependent upon photographs" *Id.* at 2. In the present case, Dr. Woodford testified two years after the smells were generated. His testimony was based on nothing more than information he received from the Fagers and from their counsel.

In *United States v. Viers*. No. CR.04-60094-HO (March 2, 2005), the court rejected Dr. Woodford's testimony regarding selective perception and masking of the smell of marijuana, suppressing the marijuana *Id.*, at 5-6. On appeal, the Court of Appeals affirmed. *United States v. Viers*, 251 Fed.Appx. 381 (9th Cir.2007).

In *United States v. Correa*, No.1 :07-cr-00011-MP-AK (N.D. Florida, April 18, 2008). Dr. Woodford testified it was "impossible for the odor of

marijuana to travel the distance from which the several officers testified that they smelled it" because it was made of distinct elements and that it was "scientifically impossible" for the marijuana odor to travel outside the house.

Id., page 10. The Court stated the following at page 7:

"As for the testimony of Dr. Woodford that it was 'scientifically impossible' for the marijuana odor to travel outside the house, the Government notes that **Dr. Woodford is a professional defense witness, and has not published any of his theories and subjected them to peer review.** Rather, Dr. Woodford testified that he thought being named in a court opinion constituted being 'published,' and that the courts were the best type of peer review." (emphasis added).

The Court stated the following at page 9:

"Dr. Woodford, although an expert in chemistry, testified about abstract scientific principles, rather than concrete tests that he has run, or results that he has published and subjected to peer review in the scientific community. In contrast, numerous law enforcement agents testified about their own personal observations at both houses, and their conclusions based upon their training and experience that marijuana odor was present."

The present case suffers from the same problem: Besides "abstract scientific principles" that have not been "published and subjected to peer review in the scientific community," Dr. Woodford testified only about generalities based upon his previous observations.

ISSUE FOUR: Did the Trial Court err when it accepted testimony from Dr. Woodford about filtration systems solely because Dr. Woodford said he is familiar with the use of filtration in marijuana grow operations? (Assignment of Error 7)

RESPONSE: Other than Dr. Woodford's testimony that he had seen other closed grows with a filtration system, nothing established that he has any expertise in this area.

I. Standard of Review: A trial court's decision to admit or exclude expert witness testimony is reviewed for an abuse of discretion. *State v. McCarthy, supra*. A trial court abuses its discretion when it relies on unsupported facts, applies the wrong legal standard, or when it adopts a view that no reasonable person would take. *State v. Rohrich, supra*.

II. Analysis: Dr. Woodford is not qualified to testify about filtration systems. His curriculum vitae (CP 62, pages 71-74) does not list any training or experience as an expert in filtration. At trial, he was permitted to testify because he said he was familiar with filtration systems. (5/2/2013; 8/20/2012 RP II-77). Being familiar with how something works does not qualify someone as an expert. If that were the only requirement, anybody familiar with how a car starts could testify as a mechanic. ER 702 requires the witness possess "scientific, technical, or other specialized knowledge" before the person can testify as an expert. Viewing other filtration systems does not make Dr. Woodford an expert in the field. A witness may not testify about an issue that lies outside the witness's area of expertise. *State v. Weaville*, 162 Wn.App. at 824, 256 P.3d 426.

Moreover, finding Seven is not supported by substantial evidence because Dr. Woodford never saw the filtration system in operation.¹³ Dr.

¹³ A finding must be supported by substantial evidence. *McDonald v. Parker*, 70 Wn.2d 987, 988, 425 P.2d 910 (1967). Evidence is substantial if it is sufficient to persuade a fair-minded rational person of the declared premise. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Woodford was permitted to testify about whether Steven Fagers' filtration system would have blocked leaking marijuana, even though he had never seen the system in operation and his testimony was based solely upon what Steven Fager told him. The system had been dismantled by the time Dr. Woodford viewed it; all the filters had been removed and the system was completely shut down.(5/2/2013; 8/20/2012 RP II 84-5). He would not have been able to make a qualified statement about the efficiency of the filtration system. The Trial Court erred in placing any emphasis on Dr. Woodford's testimony without more proof he really is an expert on filtration systems and actually knew something about the Fager's filtration system.¹⁴

ISSUE FIVE: Did the Trial Court committed reversible error by incorrectly applying the *Franks*¹⁵ test when it determined the OPNET detectives smelled marijuana but were reckless when they told the magistrate they smelled marijuana in excess of 30 to 60 feet away from its source? (Assignments of Error 1, 8 and 10)

RESPONSE: The Trial Court's determination that the OPNET detectives acted in reckless disregard because they told the magistrate they smelled marijuana coming from the direction of 115 freeman on 23 separate occasions (8 by Apeland, 8 by Waterhouse, 3 by Grall, 4 by Fischer) is a totally incorrect application of the *Franks* test.

I. Standard of Review: The determination whether the qualifying information in a search warrant affidavit establishes probable cause is a legal question

¹⁴ If the finding is related to the Steven Fager's testimony, it is not supported by substantial evidence either. *McDonald v. Parker*, at 988, 425 P.2d 910. Four OPNET detectives smelled marijuana odors coming from the building at 115 Freeman Lane, on four separate occasions for a total of 23 times. In addition, numerous detectives smelled marijuana when the thermal search warrant was served. No *rational* person would believe that the filtration system worked well. The testimony and evidence clearly does not support the finding.

¹⁵ *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), hereinafter *Franks*

reviewed *de novo*. *State v. Ollivier*, No. 86633-3, slip op. at 15 (Wn., October 31, 2013).

II. Analysis: *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), addressed whether defendants should be permitted to challenge the veracity of the officers who supplied information to a magistrate in a search warrant affidavit. *Id.* at 164. The United States Supreme Court determined that the Warrant Clause in the Fourth Amendment required that the information provided to the magistrate be truthful. *Id.* at 164. By "truthful" the Supreme Court meant as follows:

"This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true."

Id. at 165. Because the magistrate is tasked to find probable cause based upon the information in the affidavit, "it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment."

Id. at 165. Thus, the *Franks* test only relates to whether the officers were truthful about what they told the magistrate. It does not matter whether they actually smelled marijuana and it does not matter whether they were accurate about the source of the smell. The *Franks* test only requires that they believe

they were telling the truth when they supplied the information to the magistrate.

The Trial Court did not find the OPNET detectives intentionally made a knowingly false statement to the magistrate about smelling marijuana. When the State asked the Court what it found reckless, the Trial Court explained the detectives were “reckless in associating it with 115 Freeman Lane...” (5/2/2012; 1/9/2013 RP V-47. The Court’s explanation correlates with the Court’s oral opinion when the Court stated “I don’t know what they were smelling. Maybe there’s other marijuana in the neighborhood, but they certainly couldn’t smell if from 115 Freeman Lane.” Court’s Oral Opinion, (5/2/2013; 12/19/2012 RP 15-17). The Trial Court accepted Dr. Woodford’s testimony that they could not have smelled growing marijuana from 115 Freeman Lane and therefore made statements in reckless disregard of the truth.

Finding of fact number 11 incorrectly applies the *Franks* concept of recklessness. The *Franks*’ “reckless disregard” standard permits a court to eliminate any representation that an officer should know is wrong. A reckless disregard for the truth may be shown where the affiant “ ‘in fact entertained serious doubts as to the truth’ of facts or statements in the affidavit.” *State v. Chenoweth*, 127 Wn.App. 444, 456, 111 P.3d 1217 (2005), quoting from *State v. Clark*, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001):

As the court noted in [*State v.*] *O’Connor*, 39 Wn.App. 113, 117- 18, 692 P.2d 208 [(1984)], *Franks* and the relevant Washington decisions

do not illuminate what constitutes "reckless" disregard for the truth. However *O'Connor* applied the test of *United States v. Davis*, 617 F.2d 677, 694 CD.C.Cir. 1979), where the court deemed recklessness shown where the affiant "'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit."...Such "serious doubts" are "shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *O'Connor*, 39 Wn.App, at 117, 692 P.2d 208 (citing *Davis*, 617 F.2d at 684. "If these requirements are not met the inquiry ends." [*State v.*] *Garrison*, 118 Wn.2d [870] at 873, 827 P.2d 1388 [1992]). (one citation omitted)

The testimony of all four detectives was clear and unequivocal that they smelled marijuana emanating from 115 Freeman Lane at five different locations for a total of 23 separate nose hits. The detectives were clear and unequivocal that the smell came from the west; the only building to the west was 115 Freeman Lane. Their testimony was exactly the same as they had provided to the magistrate in the search warrant affidavit. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANT, 9/22/2009, exhibit 219, pages 73-78; Exhibit 98, page 88, attached as Appendix B. There is nothing to show the OPNET detectives entertained *any* doubts about the source of the marijuana smell. They may have been mistaken but a showing of mere negligence or inadvertence is insufficient. *State v. Chenoweth*, 160 Wn.2d 454, 462, 158 P.3d 595 (2007).

As the United States Supreme Court explained in *Herring v. United States*, 555 U.S. 135, 144-45, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009), the exclusionary test is "more stringent" than whether there has been a mistake or negligence:

The pertinent analysis of deterrence and culpability is objective, not an "inquiry into the subjective awareness of arresting officers," Reply Brief for Petitioner 4-5. See also *post*, at 710, n. 7 (GINSBURG, L, dissenting). We have already held that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal" in light of "all of the circumstances." [*United States v.*] *Leon*, 468 U.S. 897,922, n. 23, 104 S.Ct. 3405, [82 L.Ed.2d 677] (1984). These circumstances frequently include a particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, *Ornelas v. United States*, 517 U.S. 690, 699-700, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), but not his subjective intent, *Whren v. United States*, 517 U.S. 806,812-813,166 S.Ct. 1769,135 L.Ed.2d 89 (1996).

Herring pointed out that the record-keeping error that led to an arrest in that case would not trigger the Fourth Amendment's exclusionary rule unless there was a reason to believe the mistake was a "deliberate or tactical choice." *Id.*, at 138:

When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase "probable cause" confirms that the Fourth Amendment does not demand all possible precision. And whether the error can be traced to a mistake by a state actor or some other source may bear on the analysis. For purposes of deciding this case, however, we accept the parties' assumption that there was a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied.

Id., at 139. The exclusionary rule did not apply because there was no basis to believe the error was purposeful:

"If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth

Amendment violation.”

Id. at 146.

When the Trial Court accepted Dr. Woodford’s testimony that the smell of marijuana only extended 30 to 60 feet, the Court’s next step was to determine whether the detectives were mistaken, or whether the statements were a “deliberate or tactical choice,” or showed flagrant misconduct. *Leon*, 468 U.S. at 911, 104 S.Ct, 3405. The Court found none of the above. Instead, the Trial Court determined the OPNET detectives were reckless because they told the magistrate they smelled marijuana at a distance more than Dr. Woodford testified is possible (5/2/2013; 12/19/2012 RP 15-17).

The Court’s analysis is illogical. Either the detectives were deceitful to the magistrate or they were merely mistaken about where they smelled the marijuana. In the absence of any information about a deliberate or tactical choice, the Court was required to defer to the magistrate. Each officer testified about their prior experience, in which they had smelled marijuana on a number of occasions; Detectives Grall and Apeland both testified they had smelled it at distances greater than 30 to 60 feet on many occasions and had found the marijuana when they searched for it (9/6/2013; 8/27/3012; RP II-191; (5/2/2013; 8/20/2012 RP II-172).

All the findings show is that the Trial Court did not believe the officers. There is no to show they deliberately lied to the magistrate or that they should

have known that marijuana can only be smelled at a distance of 30 to 60 feet. Only Dr. Woodford believes one cannot smell the odor of marijuana at a distance greater than 30 to 60 feet. The Trial Court erred when it relied on Dr. Woodford's testimony and then viewed the nose hits as reckless disregard for the truth when the record shows the officers were not objectively reckless.

In the end, the Trial Court simply misapplied the rules relating to whether there is substantial evidence to support the magistrate's determination of probable cause. "Probable cause may be based on hearsay, a confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial." *Chenoweth*, 160 Wn.2d at 475, 158 P.3d 595, citing to *State v. Huft*, 106 Wn.2d 206, 209-10, 720 P.2d 838 (1986). "In evaluating whether probable cause supports the search warrant, the focus is on what was known at the time the warrant issued, not what was learned afterward...Probable cause requires more than suspicion or conjecture, but it does not require certainty." It only requires "merely probable cause to believe it may have occurred." *Id.* at 160 Wn2d 476. The Trial Court found the four detectives smelled marijuana 23 separate times, which makes their assertion a certainty.

State v. Seagull, 95 Wn.2d 898, 907-908, 632 P.2d 44 (1981), provides the analysis about whether the police have provided probable cause of a crime. The officers must provide sufficient circumstances going beyond suspicion and mere personal belief to the magistrate *Id.*, at 907-8. The magistrate then

determines whether there is sufficient evidence of criminal conduct to support issuance of a search warrant. *Id.*, at 907-8. Once the magistrate's determines that there has been an adequate showing under oath of circumstances going beyond suspicions and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be searched, the determination should be given great deference. *Id.*, at 907.

In *Seagull*, an officer with less than one-half the experience of Detective Grall, and an amount equal to Detective Apeland said he saw marijuana when he approached a residence *Id.*, at 907. He obtained a search warrant to search the premises but found a tomato plant instead *Id.*, at 906. The defense assumed the officer mistook a tomato plant for a marijuana plant and sought suppression of the marijuana evidence because the officer was mistaken *Id.*, at 906. Their argument was that the officer did not see evidence of a crime, so therefore probable cause did not exist to issue a search warrant. The Washington Supreme Court rejected the argument, stating that the mistake did not invalidate the search warrant because the misidentification was a mistake, not a deliberate falsehood or a reckless statement *Id.*, at 908.

The same analysis applies in this case. The Court agreed that the OPNET detectives smelled marijuana, making the statement that this case “boils down to the officers’ claim that they smelled marijuana” on page 9 of the findings and conclusions an incorrect statement of law. The test is whether

they provided sufficient facts that they believed were true so that a magistrate can find probable cause to issue a search warrant. *State v. Seagull*, 95 Wn.2d at 908, 632 P.2d 44. The Court erred when it relied on the testimony of Dr. Woodford to measure whether the search warrant was supported by sufficient evidence to establish probable cause. Whether Dr. Woodford thought they were untruthful is unimportant (finding 10).

Assignment of Error 1

Suzzi Seagull explains why the Trial Court erred when it stated “this case boils down to the officers’ claim that they smelled marijuana.” Page 9, findings of fact, attached as Appendix A. The finding is not supported by substantial evidence because the Trial Court did find they smelled marijuana. More importantly, the statement misses the point: Their claim they smelled marijuana is sufficient for probable cause, even if they were incorrect about the location.

Assignment of Error 8

The Court's chiding of the State for not bringing its own expert also shows the Court's analysis is focused on the wrong standard. The issue is not Dr. Woodford’s testimony about the chemical makeup of marijuana. The issue was whether the detectives believed they were being truthful about what they told the magistrate. Absent a finding the detectives did not believe what they told the magistrate (and testified to in court), Dr. Woodford's testimony was

irrelevant.

Assignment of Error 10

There is nothing in the *Franks* test that supports a finding of reckless disregard when an officer “tells the magistrate about a number of ‘nose hits’ claimed at multiple locations, all of which are impossible distances from the shed.” Telling the magistrate about something is insufficient to show recklessness.

Assignment of Error 12

ISSUE SIX: When the Trial Court suppressed the evidence obtained with the thermal imager, did the Court have any basis to suppress “all information obtained from the search and relayed to the court reviewing the search warrant application”? (Assignments of Error 11 and 12).

RESPONSE: There is no basis to suppress any of the other evidence the OPNET detectives observed when they served the thermal search warrant. The tape was suppressed because of mismanagement, not because the detectives exceeded the scope of the search warrant.

Standard of Review: A finding not founded on substantial evidence must be stricken. *State v. Vasquez*, 95 Wn.App. 12, 16, 972 P.ed 109 (1998) (MRT requirement stricken because lack of sufficient evidence).¹⁶

Analysis: Finding 12 reads:

“The Court finds that all references to the smell of marijuana must be stricken from the affidavit in support of the thermal image warrant as well as the affidavit in support of the search warrant for 115 Freeman

¹⁶ This finding appears to be a conclusion. A conclusion labeled as a finding will be reviewed *de novo*. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335, 308 P.3d 791, 796 (2013).

Lane.”

Finding 12 is a conclusion of law.¹⁷ It is not supported by a finding because the Trial Court never entered a finding explaining why the observations of detectives made when the thermal image warrant was served should be suppressed. A finding saying the evidence is not admissible would not be based on substantial evidence because the officers were within the 30 to 60 foot halo which the Court found was reasonable in finding 4. The finding/conclusion should be stricken.

There is no finding explaining why any evidence obtained absent the thermal imaging tape should be suppressed. There is no evidence to support suppressing the other evidence obtained by OPNET detectives when they served the thermal search warrant. Substantial evidence shows the OPNET detectives were less than 30 to 60 feet from 115 Freeman Lane when they smelled the marijuana while serving the thermal search warrant. CONSOLIDATED AFFIDAVIT FOR SEARCH WARRANTS, exhibit 219, October 1, 2009, pages 22-29. The Trial Court found that a detective would be able to smell marijuana at a distance less than 30 to 60 feet (Finding of Fact 4,

¹⁷ A trial court's order on a suppression motion is reviewed to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Mashek*, No. 42790-7-II, slip op. 2 (Wn.App. November 13, 2013) A conclusion labeled as a finding will be reviewed *de novo*. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335, 308 P.3d 791, 796 (2013). A finding not founded on substantial evidence must be stricken. *State v. Vasquez*, 95 Wn.App. 12, 16, 972 P.ed 109 (1998) Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth.

page 10). The Court's conclusion suppressing any evidence except that related to the thermal imaging is not supported by a finding or by substantial evidence and is therefore error. *State v. Mashek*, No. 42790-7-II, slip op. 2 (Wn.App. November 13, 2013). The evidence is admissible.

CONCLUSIONS OF LAW

Assignments of Error 12-1

ISSUE SEVEN: With an abundance of information to support the issuance of the thermal search warrant and the search warrant for utility records, and with the additional information obtained when the thermal search warrant was served, has the Trial Court committed reversible error when it suppressed all the evidence obtained in the search of 115 Freeman Lane? (Assignments of Error 12-17).

RESPONSE: The magistrate reviewed a plethora of information, including the incorrectly suppressed information obtained while the thermal search warrant was being served. Concluding the search warrant to search the building at 115 Freeman Lane is simply wrong.

I. Standard of Review: The issuance of a search warrant is reviewed for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). The issuing magistrate's determination of probable cause is given great deference by the reviewing court. *State v. Clark*, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001).

II Analysis: Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199

(2004), citing to *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). In determining probable cause, the magistrate makes a practical, commonsense decision, taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences. *Id.* at 509, 98 P.3d 1199; *State v. Martin, supra*, at 320. The trial court sits as an appellate court and reviews the four corners of the search warrant affidavit to determine whether the magistrate correctly concluded there is probable cause to issue a search warrant. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). All doubts are resolved in favor of the warrant's validity. *State v. Maddox, supra*, at 509, citing to *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993). Even if the propriety of issuing the warrant were debatable, the deference due the magistrate's decision would tip the balance in favor of upholding the warrant. *State v. Jackson*, 102 Wn.2d 432, 446, 688 P.2d 136 (1984). In light of the deference owed the magistrate's decision, the proper question on review is whether the magistrate *could* draw the connection, not whether the magistrate *should* do so. *State v. Shupe*, 172 Wn.App. 341, 357-8, 289 P.3d 741 (2012).

It is ironic that the Trial Court found a 240 page search warrant affidavit far too long, suggesting that ten pages would have been sufficient (5/2/2013; 12/19/2012 RP V-9), but then concluded the 240 pages of information supplied to the magistrate is insufficient to issue the thermal image search warrant. The Statement of the Case presents only some of the

information the magistrate considered before issuing the thermal image search warrant. Although the nose hits were incorrectly suppressed, the remainder of the information provided to the magistrate still proved probable cause to issue the thermal search warrant and the utility consumption search warrant¹⁸ a search warrant for 115 Freeman Lane. Further, what has been overlooked by the Fagers is that OPNET was also conducting surveillance of Al Sullivan. He is mentioned predominantly in the buys that OPNET made with the CI throughout the affidavits. He also was a business partner and a land owner in conjunction with the Fagers. CONSOLIDATED AFFIDAVI FOR SEARCH WARRANTS, September 22, 2009, exhibit 219, at 56; AFFIDAVIT FOR SEARCH WARRANT (SUPPLEMENT), September 11, 2009, exhibit 219, at 109. The search warrant affidavits overwhelmingly provided enough information to tie Al Sullivan to 115 Freeman Lane CONSOLIDATED AFFIDAVI FOR SEARCH WARRANTS, September 22, 2009, exhibit 219, at 71. The magistrate had more than enough evidence to tie all three people to 115 Freeman Lane because OPNET was investigating all three at that location to see where the marijuana was being grown. CONSOLIDATED AFFIDAVI FOR SEARCH WARRANTS, September 22, 2009, exhibit 219, at 71. The magistrate had sufficient information to issue the thermal image search warrant and the search warrant for utility records as the next step in OPNET's

¹⁸ The Fagers never challenged the appropriateness of the utility consumption search warrant or the evidence it provided in the record.

attempt to find the source of the marijuana that Al Sullivan was selling. The trial court erred when it suppressed both the information gained from the observations of the officers when the thermal search warrant was served and the results of the latter search of 115 Freeman Lane, with or without the 23 other nose hits. *See e.g. State v. Ollivier*, No. 86633-3, slip op. at 15 (Wn. October 31, 2013) (when material falsehoods are included in an affidavit, the test is whether there is sufficient evidence support a finding of probable cause).

The trial court did not review the four corners of the information known to the magistrate, showed no deference to the magistrate, and did not review the affidavit. All doubts are resolved in favor of the warrant's validity. The trial court did not believe the detectives could smell the odor of marijuana. The trial court then asked itself "can you smell marijuana" and "how do you know it's coming from [115 Freeman Lane] and not some other place, if you do indeed smell marijuana?" (5/2/2013); 12/9/2012 RP V-14). Had the trial court not focused upon Detective Apeland's first nose hit and had focused instead on the plethora of information viewed by the magistrate in a deferential, commonsense manner that seeks to affirm the magistrate, it would have correctly concluded the search warrants were correctly issued. The Court's conclusions that all the evidence obtained from the two searches contested by the Fagers are incorrect. Thus, the conclusions and order suppressing the evidence are not correct.

CONCLUSION

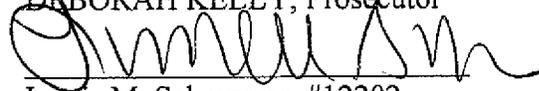
The Trial Court's first major error to permit Dr. Woodford to testify as an expert when the Fagers had not shown his testimony arose from a peer-reviewed study and was generally accepted in the relevant scientific community. Dr. Woodford believes he is correct and he may be, but until his theory is generally accepted, it is just junk science. From there, the Trial Court simply placed too much emphasis on Dr. Woodford's testimony.

The second major error was improper application of the *Franks* test. The OPNET detectives believed what they told the magistrate and the information was more than sufficient to obtain both the thermal imaging search warrant and the utility consumption search warrant. Even with the nose hits removed, moreover, the incredible amount of detail provided to the magistrate would have been enough for the next step in the investigation process, which was to determine whether the building at 115 Freeman Lane was the grow site. The Trial Court's suppression of the thermal imaging tape should not have led the Court to suppress other evidence obtained while the detectives were at 115 Freeman Lane on September 24, 2009. This evidence, combined with even a portion of the other evidence reviewed by the magistrate, was sufficient to issue a search warrant to find out what was inside the building. When the building was opened, a very sophisticated grow operation, powered by an alleged electrical bypass, was found, along with all the tools necessary to sort,

weigh, bag and distribute the marijuana. This Court should find the failure to conduct the *Frye* examination was error sufficient to send this matter back to court. This Court should also determine that the Trial Court improperly applied the *Franks* test and determine *de novo* the search warrant affidavits were sufficient.

Respectfully submitted this 27th day of November, 2013.

DEBORAH KELLY, Prosecutor

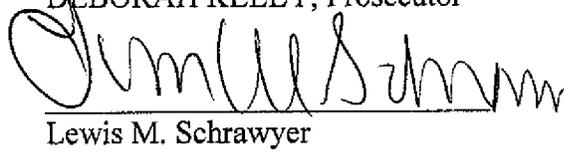


Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney
Clallam County

CERTIFICATE OF DELIVERY

Lewis M. Schrawyer, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Michael Haas and James Dixon on November 27, 2013.

DEBORAH KELLY, Prosecutor



Lewis M. Schrawyer

APPENDIX A

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Hearing January 4, 2013

SUPERIOR COURT OF WASHINGTON
FOR JEFFERSON COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

TIMOTHY FAGER

Defendants.

No. 09-1-00172-9

**Findings of Fact and Conclusions of
Law Pursuant to CrR 3.6 and CrR
8.3(b)
AND ORDER**

STATE OF WASHINGTON,

Plaintiff,

v.

STEVEN FAGER

Defendants.

No. 09-1-00173-7

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PAGE 1 OF 15

*DIXON & CANNON, LTD.
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1 Defendants filed a motion to suppress physical evidence under CrR 3.6, as well
2 as a motion to dismiss and/or suppress under CrR 8.3(b). Based upon an initial
3 showing by the defense, the Court incorporated a *Franks v. Delaware*, 438 U.S. 154
4 (1985) hearing into the CrR 3.6 motion. The Court received live testimony from the
5 following witnesses: Det. Michael Grall; Sgt. Eric Kovatch; Sgt. Jason Viada; Det.
6 Jeffery Waterhouse; Det. Keith Fischer; Sgt. Mark Apeland; Det. James Vorhies; Det.
7 Kevin Spencer; Cpl. Robert Ensor; Alan Dupree; Lynn Adams; Kenny Baker; Patty
8 Baker; Danny Haynes, James Woodford, Ph.D and Steve Fager. The Court also
9 considered the pleadings contained within the court file, the exhibits admitted into
10 evidence, and the argument of counsel.

11 The primary issue before the Court is the validity of two warrants: the thermal
12 image warrant (SW 09-653-655 SBT) issued on September 22, 2009, and the search
13 warrant for the 115 Freeman Lane (SW 09-4119-4124 KW) issued on October 1, 2009.
14 The affidavit in support of the thermal image warrant was admitted as exhibit 204¹,
15 while the affidavit in support of the Freeman Lane search warrant was admitted as
16 exhibit 219.
17

18 After full consideration of the above listed witnesses, exhibits and pleadings, this
19 Court finds as follows:
20

21
22
23 ¹ In its oral ruling the Court referenced Exhibit 219 and 220. The Court meant to include reference to
24 exhibit 204 which is the thermal search warrant affidavit and search warrant, reviewed and signed by
Judge Brooke Taylor.

FINDINGS OF FACT

1 **Findings of Fact relating to TFI-08-07.** With respect to the issues raised by the
2 defense relating to Confidential Informant Joseph Haynes, also known as TFI-08-07,
3 this Court makes the following findings:

4 1. Joseph Haynes was a convicted sex offender employed by OPNET as a
5 confidential informant;

6 2. There was an active out-of-state arrest warrant for Mr. Haynes relating to
7 this prior sex offense. The magistrate was aware of both this prior conviction and the
8 warrant at the time he signed the search warrant.

9 3. Mr. Haynes' sex offense relates to sexual contact with a younger female
10 when Mr. Haynes was himself a minor.

11 4. In the absence of a no contact order, OPNET was not legally required to
12 notify CPS or Kenneth Baker that Mr. Haynes was a sex offender.

13 5. Mr. Haynes was registered as a sex offender living at his father's house.
14 The fact that Mr. Haynes often stayed with Ms. Adams at the Baker's house, rather than
15 his father's house, is of no significance.

16 6. The Court accepts the testimony of OPNET officers that Joseph Haynes
17 did not appear to be regularly intoxicated.

18 7. The defense points to other specific instances of misconduct by Joseph
19 Haynes that were not reported to the issuing magistrate. These include: a) that
20 between July and November, 2008, Joseph Haynes traded Xanax and bought and used
21

1 marijuana with Amy Englebright; b) that between August and October, 2008, Joseph
2 Haynes made several unsanctioned buys from Ollie Dannels; c) that in September,
3 2008, Joseph Haynes made an unsanctioned buy from Dustin Baker and used a
4 controlled substance; d) on September 24, 2008, Joseph Haynes used a controlled
5 substance and was admonished by OPNET; e) on October 15, 2008, Joseph Haynes
6 made an unsanctioned buy and sale of marijuana and OPNET admonished him; f) on
7 November 19, 2008, Joseph Haynes used marijuana with Scott Gockerell and was
8 admonished; g) on November 20, 2008, Joseph Haynes told OPNET he purchased
9 Mescaline and Marijuana off and on from Scott Gockerell. Although these instances of
10 misconduct by Joseph Haynes are uncontested, the Court does not make findings as to
11 these allegations, but does note that information relating to Joseph Haynes is not
12 particularly compelling as applied to the validity of the search warrant for 115 Freeman
13 Lane.
14

15
16 **Items seized at Tim and Steve Fager's Residences.** Although the primary issue
17 before this Court is the validity of the search warrant for 115 Freeman Lane, the
18 defendants refer to improprieties at their own residences which bear upon the CrR
19 8.3(b) misconduct claim. The Court makes the following findings:
20

21 1. OPNET seized Tim Fager's truck and construction tools when they
22 searched his residence. Tim Fager is a contractor and relied upon that truck and those
23 tools for his trade.
24

25 *FINDINGS OF FACT AND CONCLUSIONS OF LAW*

26 *PAGE 4 OF 15*

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28

2. The search warrant for Tim Fager's residence did not call for the seizure of these items.

3. *Searching officers 1/9/12 49*
~~OPNET~~ seized Steve Fager's laptop computer and Canadian currency when they searched his house. Neither of these items was listed on the evidence log.

4. The Court finds that given the number of warrants involved, these transgressions were minor with respect to CrR 8.3(b) and do not invalidate the search of the shop at 115 Freeman Lane.

5. More troubling for the Court is the marijuana found at Steve Fager's residence. OPNET officers testified that they found three bags of frozen marijuana in Steven Fager's freezer. The marijuana was packaged the same as the marijuana found at the previously searched Freeman Lane property.

6. Steve Fager testified that he did not bring the marijuana to the house, and that given the way in which the marijuana was processed at the Freeman Lane address, there would have been no reason for him to bring frozen marijuana home. This Court finds that Steven Fager was not lying when he gave this testimony.

7. The Court further finds that the State's timeline as to the discovery of the marijuana does not make very much sense.

At the same time, this Court does not believe that the OPNET officers committed perjury or demonstrated a reckless disregard for the truth when they claimed they did not plant the marijuana. Ultimately, while the Court is at a loss to explain how

the marijuana got there, it does not create a basis to invalidate the search at 115
Freeman Lane.

Warrant Handling Process in Clallam County This Court is also very troubled by the
procedures for handling search warrant applications in Clallam County. The Court
makes the following findings.

1. In Clallam County, OPNET officers applying for a non-telephonic warrant
are not required to leave a copy of the search warrant or the declaration in support of
the warrant with the Court. Rather, after the court has signed the warrant, the
detectives are permitted to walk out of the courtroom with the only copy of the warrant
and affidavit in support of the warrant.

2. This procedure raises the possibility that either the warrant or the
declaration could be altered depending upon what was discovered at the search site.
This danger is enhanced in cases such as the present one, where the affidavit for the
search warrant is 240 pages long with no page numbers.

3. In the present case there are ^{some minor} differences between the State's copy of the
warrant application (Ex. 219) and the clerk's copy submitted by the defense (Ex. 220).
This Court cannot say as fact that exhibit 219 is what the magistrate actually reviewed.
Although this procedure causes great concern for this Court, it does not find perjury on
behalf of Detective Grall or Detective Vorhies. And while the Court believes this

procedure should be changed, this deficiency does not require suppression or dismissal of charges.

1
2
3 **Trespass by OPNET on Fager Property.** With respect to the issue of ~~multiple~~ ^{CR 1/2/13}
4 trespasses by OPNET onto 115 Freeman Lane, the Court makes the following findings.

5 1. The property at issue was in a ~~remote and heavily forested~~ ^{RURAL WA 1/2/13} area. The only
6 access road was gated and locked. There were ~~multiple~~ ^{FOUR CR 1/2/13} no trespassing and no hunting
7 signs on the property. The Fagers did not grant or recognize any type of easement or
8 right of way for hunters or neighbors to travel across the land. The Fagers reasonably
9 expected neighbors and strangers alike to respect their privacy on the property.
10

11 2. The court finds that OPNET trespassed upon 115 Freeman Lane prior to
12 the execution of the thermal image warrant during the surveillance phase of the
13 investigation. The Court bases this finding on the testimony of Allen Dupree (the
14 surveyor OPNET hired), the testimony of Det. Mark Apeland, and the location of Border
15 Patrol agent Keith Fischer's knife. The Court finds the testimony of Mr. Dupree
16 credible and helpful with respect to the issue of trespass.
17

18 3. It is not necessary for the Court to determine the number of times and to
19 what extent OPNET trespassed on the property. Ultimately, OPNET's trespass on the
20 Fager property plays no role in the Court's ruling on the suppression motion.
21
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1 4. This Court does not believe it needs to address the issue of trespass with
2 respect to Kathleen Wheller's residence or property adjacent or near 115 Freeman
3 Lane, and does not do so.

4 **Mismanagement in production of discovery.** With respect to the issue of
5 mismanagement by the State in meeting its discovery obligations, the Court makes the
6 following findings.

7
8 1. The State produced over ~~12,000~~ ^{10,000} pages of discovery. Much of this was
9 needlessly duplicative.

10 2. As one example, Steve Fager revealed how the State produced the same
11 page (identified by an hour glass shaped drawing at the top of the page) 57 times. This
12 Court finds that this duplication of paperwork resulted in needless confusion, as well as
13 time and expense in defending against these charges.

14
15 3. The Court finds this duplicative paperwork to constitute mismanagement
16 under CrR 8.3, but that it does not rise to the level that dismissal is required.

17 4. The defendants raised a number of other ways in which discovery issues
18 impacted their ability to prepare a defense. Given the Court's ultimate conclusions on
19 the CrR 3.6 motion, it is not necessary for the Court to address these other discovery
20 issues.
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1 **The Smell of Marijuana.** While the defense has raised a number of challenges to the
2 warrants, this case boils down to the officers' claim that they smelled marijuana. These
3 "nose hits" of marijuana were relied upon to obtain the thermal image warrant, and were
4 again relied upon to obtain the search warrant for 115 Freeman Lane. As to the smell
5 of marijuana, this Court makes the following findings:

6 1. The Court heard testimony from Dr. Woodford. Dr. Woodford has a Ph.D.
7 in chemistry from Emory University, with Postdoctoral studies in Medicinal Chemistry
8 from Kansas University. He has been testifying as an expert in marijuana and
9 controlled substances since the 1990s. The State has acknowledged that Dr.
10 Woodford is an expert on canine drug detection, but argues that Dr. Woodford is not an
11 expert on human detection of marijuana. The Court finds Dr. Woodford to be a credible
12 expert on the subject of odor of marijuana, and finds his opinions to be helpful to the
13 issues at hand.
14

15 2. Dr. Woodford testified that the odor of growing marijuana is comprised of
16 68 chemical components, all of which must be together in order to produce the smell we
17 associate with growing marijuana. These components all have different molecular mass
18 weights, however, which cause them to disentangle once they are airborne. As a
19 result, the odor of growing marijuana cannot travel far, as the necessary 68 components
20 sink to the ground at different rates. Dr. Woodford further explained that given the
21 relatively heavy molecular weight of the marijuana aroma bouquet, the smell of
22 marijuana cannot travel very far upwards.
23
24

1 3. Dr. Woodford contrasted the marijuana aroma bouquet with single
2 molecule odors, such as sulfide dioxide from a paper mill. Because sulfur dioxide is
3 comprised of just a sulfur atom and two oxygen atoms, it is not subject to dispersal like
4 marijuana odor. Further, it can attach itself to water molecules to travel great distances,
5 something marijuana odor with its 68 chemical components is incapable of doing.

6 4. Given the physical properties of the marijuana bouquet, growing marijuana
7 is difficult to smell from distance. For instance, it may be possible for a human to smell
8 growing marijuana that is 30 to 40 feet away. It might even be within the realm of
9 possibilities, although extremely unlikely, for a human to catch a trace of marijuana at
10 50 to 60 feet. But any further, it is no longer humanly possible to detect the smell of
11 growing marijuana.

12 5. Dr. Woodford emphasized that the above distances assume ideal
13 conditions. If, for example, there is a filtration system in effect, it may not be possible to
14 smell growing marijuana at any distance outside of the building. This is consistent with
15 Det. Grall's statement in his affidavit that a filtration system makes it difficult or
16 impossible to smell marijuana coming from an indoor marijuana grow operation. The
17 Court heard persuasive testimony that there was two independently operating,
18 sophisticated filtration systems in place at the time of the surveillance.
19

20 6. The State did not present any expert testimony to contradict Dr.
21 Woodford's scientific testimony relating to the odor of marijuana.
22
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1 7. The first nose hits OPNET officers claimed to have obtained were listed on
2 exhibit 98 as locations A, B, and C. The respective distance from each of these three
3 locations to the vent is 239 yards, 295 yards, and 306 yards. In addition to these three
4 locations, OPNET officers also claimed to have smelled marijuana coming from the
5 Freeman Lane property while walking about in the nearby neighborhood. While not
6 quite as precise in terms of distance, there were two other nose hits, one on Fulton
7 Lane and another just east of the intersection of Fulton and Freeman Lanes. Both of
8 these locations are well over 150 yards from the shed.

9 8. OPNET officers claim to have smelled marijuana from two locations up the
10 hill from the shed, Football #3 (130') and football #2 (260'), away from the building vent
11 with a total rise in elevation of 60'. Football #1, although the distance was never
12 established, appears on the map to be much farther away from the building than football
13 #2.
14

15 9. OPNET detectives also failed to report that they interviewed neighbors in
16 the area of 115 Freeman Lane. None of the neighbors interviewed report having
17 smelled marijuana.
18

19 10. Dr. Woodford was presented with the various distances at which OPNET
20 officers claimed to have smelled growing marijuana emanating from the shop at 115
21 Freeman Lane. Dr. Woodford was unequivocal that it would have been impossible for
22 the officers to smell the marijuana at those locations. The Court finds Dr. Woodford's
23
24

1 testimony on this issue credible. The Court finds that OPNET officers did not smell
2 marijuana from the locations claimed in the affidavit for the search warrant.

3 11. The court is aware that a simple mistake will not invalidate a warrant
4 under *Franks v. Delaware*, 438 U.S. 154 (1985). If this was simply one "nose hit" of
5 marijuana at an impossible distance, the Court might be more inclined to treat this a
6 reasonable mistake, or that perhaps the officers were smelling marijuana growing from
7 some other location. But given the number of "nose hits" claimed at multiple locations,
8 all of which are impossible distances from the shed, this Court has no option but to treat
9 these statements as demonstrating a reckless disregard for the truth.

10 ~~10.~~ The Court finds that all references to the smell of marijuana must be
11 stricken from the affidavit in support of the thermal image warrant as well as the
12 affidavit in support of the search warrant for 115 Freeman Lane.

13
14
15 **The Thermal Video.** The defense argument on the Thermal image relates to both the
16 CrR 3.6 and CrR 8.3(b) issues. The Court makes the following findings.

17 1. On September 22, 2009, Detective Grall obtained a thermal imagery
18 warrant.

19 2. On September 24, 2009, OPNET served that warrant by going onto the
20 Freeman Lane property.

21 3. At the time that the thermal image was taken, OPNET officers standing
22 next to the shed claimed to have smelled marijuana.
23
24

1 4. Steve Fager presented testimony that the officers would not have been
2 able to smell marijuana from that location, as the ventilation system and resulting
3 negative airflow would have prevented any smell from leaking out of the shed. As set
4 forth below, it is unnecessary for this Court to resolve this conflict in testimony.

5 5. The Court finds that the primary justification for obtaining the thermal
6 imagery warrant was the officer's claim that they could smell the marijuana from various
7 locations around the property. Because the Court finds that these assertions were
8 made with a reckless disregard for the truth, they must be stricken from the affidavit in
9 support of the warrant. When this is done, there is no probable cause to support the
10 thermal warrant. Any evidence flowing from the issuance of that warrant must be
11 suppressed.

12 6. Independent of the lack of probable cause, this Court finds that the results
13 of the thermal imagery warrant must be suppressed on the basis of mismanagement.

14 7. OPNET relied upon the results of the thermal image search warrant to
15 obtain the search warrant for the search of 115 Freeman Lane, but then destroyed or
16 allowed to be destroyed while in police custody, the thermal image video. Steven Fager
17 provided a credible argument that, given the layout of the ventilation system, the
18 thermal image video could not have shown what Det. Vorhies and Det. Grall claimed it
19 showed. The destruction of this piece of evidence while in police custody, whether
20 through negligence or intentional conduct, is extremely troubling to this Court. The
21 destruction constitutes mismanagement pursuant to CrR 8.3(b) and all information
22
23
24

1 obtained from the search and relayed to the court reviewing the search warrant
2 application must be redacted and the evidence suppressed.

3 **CONCLUSIONS OF LAW**

4 1. The Court concludes that while there was mismanagement, this
5 mismanagement does not rise to the level of requiring dismissal of charges.

6 2. The State's mismanagement of the thermal tape, which resulted in its
7 destruction, does merit suppression of the thermal images and suppression of evidence
8 gained from that search warrant under CrR 8.3(b).

9 3. The Court concludes that based on OPNET's reckless disregard for the
10 truth, all statements relating to the smell of marijuana must be redacted from the
11 affidavit in support of the thermal image warrant and the affidavit in support of the
12 search warrant for 115 Freeman Lane.

13 4. When the statements relating to the smell of marijuana are redacted, there
14 is no probable cause to support the thermal image warrant. All evidence derived from
15 that warrant must be redacted from the search warrant for 115 Freeman Lane.

16 5. When evidence gained from the thermal warrant is redacted from the
17 search warrant for 115 Freeman Lane, and when all assertions relating to the smell of
18 marijuana are redacted as well, there is no probable cause to support that search
19 warrant of 115 Freeman Lane.
20
21

22 ORDER
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24

25 *FINDINGS OF FACT AND CONCLUSIONS OF LAW*

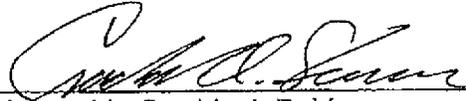
26 *PAGE 14 OF 15*

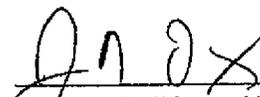
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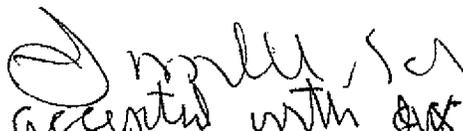
1 All evidence procured as a result of the 115 Freeman Lane search warrant
2 is suppressed.

3 Done this 9 day of January, 2013

4 
5 Honorable Craddock D. Verser

6
7 
8 James R. Dixon, WSBA #18014
9 Counsel for Defendant Tim Fager

10
11 
12 Michael E. Haas, WSBA #17663
13 Counsel for Defendant Steve Fager

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16 Lewis M. Schrawyer, WSBA #12202
17 Deputy Prosecuting Attorney

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25 FINDINGS OF FACT AND CONCLUSIONS OF LAW

26 PAGE 15 OF 15

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13 JAN -9 PM 2:17

JEFFERSON COUNTY
RUTH GORDON, CLERK

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR JEFFERSON COUNTY

STATE OF WASHINGTON,
Plaintiff,

NO. 09-1-00173-7
09-1-00172-9

vs.

STEVEN LYNN FAGER and
TIMOTHY JAY FAGER,
Defendants.

DISMISSAL ON SUPPRESSION
OF EVIDENCE

THIS COURT, having suppressed all evidence in the above-entitled matter, finds that the practical effect on the suppression of the evidence is to terminate the case. Now, therefore, the two above-entitled cases are DISMISSED.

DONE in open court this 9th day of January, 2013.

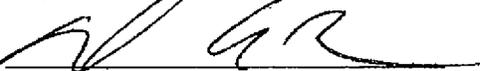

JUDGE CRADDOCK VERSER

Presented by:



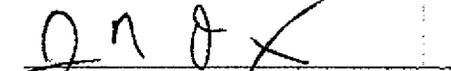
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DISMISSAL ON SUPPRESSION
OF EVIDENCE- 1

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APPENDIX B

44000
0411150

9-15-09

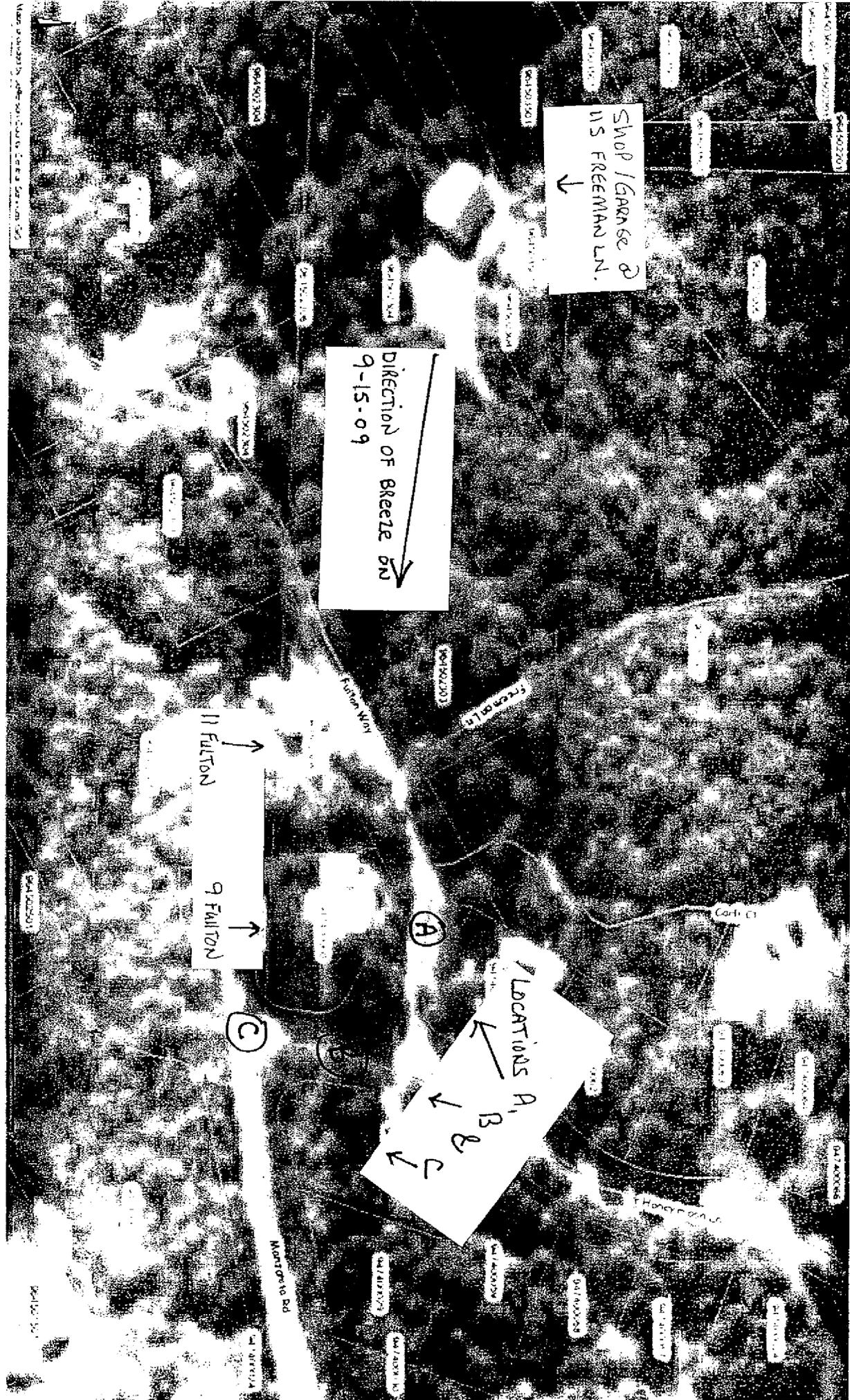
GRALL & Fischer Smelled MAITUNA

Attachment "c" for OPNTE-09-6534-58T

6534
6534

-SRT

"C"
88



2008-1922

CLALLAM COUNTY PROSECUTOR

November 27, 2013 - 7:36 PM

Transmittal Letter

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Court of Appeals Case Number: 44454-2

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